A

KELAB RENANG PULAU PINANG

v.

PENTADBIR TANAH, DAERAH TIMUR LAUT, PULAU PINANG & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
C [CIVIL APPEAL NO: P-01-05-2009]
18 MARCH 2014

LAND LAW: *Land administrator's right of way - Creation - Adjacent lands belonged to same previous owner - Land purchased for development*
D *purposes - Purchaser purchased land from previous owner having satisfied that it had right of way to adjacent land - Owner of adjacent land executed deed with previous owner and agreed to provide right of way - Whether purchaser had right to determine position of right of way - Application for private right of way to land administrator allowed -*
E *Whether land administrator exercised discretion and jurisdiction judiciously in granting right of way - National Land Code ss. 390, 393*

The present appeal concerned a private right of way created by the first respondent over the appellant's land ('Lot 417') in favour
F of an adjacent land ('Lot 418') owned by the second respondent. The northern boundaries of both lots face Jalan Tanjung Bungah. Lot 418 was not at the same level with Jalan Tanjung Bungah but the second respondent purchased Lot 418 for development purposes after being satisfied that it had a right of way over Lot
G 417 which also belonged to the same owner before it was sold to the appellant. When the appellant bought Lot 417, it had executed a deed with the previous owner by way of an indenture and agreed to provide a right of way to the second respondent. Subsequently, the second respondent applied to Majlis
H Perbandaran Pulau Pinang to develop its land and proceeded to enter into negotiations with the appellant to construct a road over Lot 417 as access from its land to the public road. Dispute ensued when the appellant pointed out that under the indenture, it had the right to determine the position of the right of way. The
I second respondent disagreed and decided to apply to the land administrator for a private right of way over Lot 417. The land administrator granted the second respondent's application.

Aggrieved by the decision of the land administrator, the appellant appealed to the High Court and submitted that the land administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the right of way. In dismissing the appeal, the High Court held that Lot 418 was landlocked with no direct access to the public road and that the land administrator had not erred in exercising his discretion. Hence, the present appeal.

Held (allowing appeal with costs)
Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) The right of way over Lot 417 granted to the second respondent was the land administrator's private right of way for the benefit of the second respondent and not for the benefit of the public. The right of way for the benefit of the public is known as a public right of way. The said right of way was not created for the benefit of the State Authority. A private right of way for the benefit of the proprietor authorises the proprietor to pass and re-pass between the land and a public terminal. (para 16)

(2) A private right of way created under s. 390 of the National Land Code ('NLC') in favour of the second respondent was not intended for the use or benefit of any person other than for the benefit of the proprietor of Lot 418 and those acting with express or implied consent of the said proprietor. In other words, a private way for the benefit of the proprietor was not meant for the unrestricted or unimpeded access to any member of the public. That distinguishes the word 'private' from the word 'public'. (para 16)

(3) The second respondent's primary intention in applying for the land administrator's private right of way over Lot 417 was for commercial development of its land and not solely for its own benefit or for the benefit of persons acting with its express or implied consent. (para 19)

(4) The land administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the private right of way of 40 feet in width which occupied about 1/3 of Lot 417. This had greatly prejudiced the appellant. A private right of way under s. 390(3) of the NLC in favour of Lot 418 was

meant for the benefit of the proprietor of Lot 418 or persons acting with its express or implied consent only. It was not for the benefit of any member of the public. It is a stringent requirement that discretion should be exercised for a proper purpose and that it should not be exercised unreasonably. (para 21)

(5) The land administrator was clearly in breach of s. 393(2) of the NLC in failing to make an order of compensation when granting the private right of way, to which the appellant was entitled under s. 393(1) of the NLC. This issue was raised but had not been duly considered. The words used in s. 393(1) of the NLC is 'for the use' of his land and not 'for damage suffered' as in s. 393(3) of the NLC. Thus, s. 393(1) does not disentitle the appellant for compensation for the 'use' of his land. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini adalah berkenaan hak lalu-lalang persendirian yang dibina oleh responden pertama di atas tanah perayu ('Lot 417) untuk tanah bersebelahan ('Lot 418') yang dimiliki oleh responden kedua. Sempadan utara kedua-dua lot menghadap Jalan Tanjung Bungah. Lot 418 tidak berada pada paras yang sama dengan Jalan Tanjung Bungah tetapi responden kedua membeli Lot 418 bagi tujuan pembangunan setelah berpuas hati bahawa ia mempunyai hak lalu-lalang ke atas Lot 417 yang mana juga dimiliki oleh pemilik yang sama sebelum ia dijual kepada perayu. Semasa perayu membeli Lot 417, ia telah memeterai satu surat ikatan dengan pemilik terdahulu melalui indentur dan bersetuju untuk memperuntukkan hak lalu-lalang kepada responden kedua. Seterusnya, responden kedua memohon kepada Majlis Perbandaran Pulau Pinang untuk membangunkan tanahnya dan meneruskan dengan memasuki perjanjian dengan perayu untuk membina jalan ke atas Lot 417 sebagai akses dari tanahnya ke jalan awam. Pertikaian timbul apabila perayu menyatakan bahawa di bawah indentur, ia mempunyai hak untuk menentukan kedudukan hak lalu-lalang. Responden kedua tidak bersetuju dan memutuskan untuk memohon kepada pentadbir tanah bagi hak lalu-lalang bagi satu hak lalu-lalang persendirian ke atas Lot 417. Pentadbir tanah membenarkan permohonan responden kedua. Terkilan dengan keputusan pentadbir tanah, perayu merayu ke Mahkamah Tinggi dan menghujahkan bahawa pentadbir tanah khilaf dalam

menjalankan kuasa budi bicaranya dan melampaui bidang kuasanya dalam memberikan hak lalu-lalang. Dalam menolak rayuan, Mahkamah Tinggi memutuskan bahawa Lot 418 adalah tanah tertutup tanpa sebarang akses kepada jalan awam dan bahawa pentadbir tanah tidak terkhilaf dalam menjalankan kuasa budi bicaranya. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Hak lalu-lalang ke atas Lot 417 yang diberikan kepada responden kedua adalah hak lalu-lalang persendirian pentadbir tanah bagi manfaat responden kedua dan bukan untuk manfaat awam. Hak lalu-lalang bagi manfaat awam dikenali sebagai hak lalu-lalang awam. Hak lalu-lalang tersebut tidak dibentuk bagi manfaat Pihak Berkuasa Negeri. Sebuah hak lalu-lalang persendirian bagi manfaat pemilik memberikan kuasa kepada pemilik untuk melalui dan melalui semula antara tanah dan terminal awam.

(2) Hak lalu-lalang persendirian yang dibina di bawah s. 390 Kanun Tanah Negara ('KTN') untuk responden kedua tidak dimaksudkan untuk kegunaan atau manfaat mana-mana orang selain daripada manfaat pemilik Lot 418 dan semua yang bertindak dengan kebenaran nyata atau tersirat pemilik tersebut. Dalam kata lain, hak lalu-lalang bagi manfaat pemilik tidak dimaksudkan bagi akses tanpa batasan atau halangan kepada mana-mana orang awam. Ini membezakan perkataan 'persendirian' daripada perkataan 'awam'.

(3) Niat utama responden kedua dalam memohon hak lalu-lalang persendirian pentadbir tanah ke atas Lot 417 adalah bagi pembangunan komersil tanahnya dan bukan semata-mata bagi manfaatnya atau bagi manfaat orang-orang yang bertindak dengan kebenaran nyata atau tersirat.

(4) Pentadbir tanah telah terkhilaf dalam menjalankan kuasa budi bicaranya dan melampaui bidang kuasanya dalam membenarkan hak lalu-lalang persendirian selebar 40 kaki yang meliputi 1/3 Lot 417. Ini amat memprejudiskan perayu. Hak lalu-lalang persendirian di bawah s. 390(3) KTN bagi Lot 418 adalah untuk manfaat pemilik Lot 418 atau orang-orang yang bertindak di bawah kebenaran nyata atau tersirat. Ia bukan

untuk manfaat mana-mana orang awam. Adalah menjadi peraturan ketat bahawa kuasa budi bicara harus dijalankan dengan tujuan yang betul dan ia tidak harus dijalankan secara tidak munasabah.

(5) Pentadbir tanah jelas melanggar s. 393(2) KTN apabila gagal mengeluarkan perintah pampasan semasa memberikan hak lalu-lalang persendirian, yang mana perayu berhak ke atasnya di bawah s. 393(1) KTN. Isu ini telah dibangkitkan tetapi tidak dipertimbangkan dengan sewajarnya. Perkataan-perkataan yang digunakan dalam s. 393(1) KTN adalah 'bagi kegunaan tanahnya' dan bukan 'bagi kerosakan yang dialaminya' seperti dalam s. 393(3) KTN. Oleh itu, s. 393(1) tidak menghilangkan hak perayu ke atas pampasan bagi 'kegunaan' tanahnya.

Case(s) referred to:

Liow Tow Thong & Ors v. Pentadbir Tanah Alor Gajah & Ors [1996] 1 LNS 131 HC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors [1986] 1 CLJ 584; [1986] CLJ (Rep) 673 HC ***(refd)***

Legislation referred to:

National Land Code, ss. 387, 388(2), 389(1)(a), (b) (3), 390(1), (2), (3), 393(1), (2), (3)

For the appellant - Derryl Goon (Chik Robyn Choi with him); M/s Robyn Choi
For the 1st respondent - Ooi Chooi Gaik; SFC
For the 2nd respondent - Ajmer Singh Sandhu; M/s Ajmer Sandhu & Ors

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin JCA:

[1] The subject matter of this appeal is a private right of way created by the Land Administrator, ie, the first respondent, over the appellant's land held under Grant No. 18520 Lot 417 ("Lot 417") in favour of adjacent land held under Grant No. 18521, Lot 418 ("Lot 418") owned by the second respondent.

[2] The site location and topography of both lots are as described in the engineering report (exh. OBS-3) tendered by the second respondent. Briefly, Lot 417 and Lot 418 are adjacent

lots situated alongside Jalan Tanjung Bungah, Pulau Pinang. The northern boundary of both lots face Jalan Tanjung Bungah. The problem with Lot 418 is that it is not at the same level with Jalan Tanjung Bungah. Its boundary alongside Jalan Tanjung Bungah is a steep reinforced granite slope of 6 metres to 13 metres high from the road level, making it very costly to construct an access road from Lot 418 directly to Jalan Tanjung Bungah. The terrain near the southern boundary is also hilly with steep slope. To the south of Lot 418 is a natural jungle without any existing access. In the east-west direction the ground levels increase from 27m-39m Reduced Level (R.L) at the western boundary, sloping upwards to 35m - 45m at the eastern boundary.

[3] The second respondent purchased Lot 418 from its previous owner for purposes of development after being satisfied that it had a right of way over Lot 417 by virtue of an indenture dated 28 December 1955. Lot 417 also belonged to the same owner before it was sold to the appellant.

[4] When the appellant bought Lot 417 from its previous owner, it executed a deed with the latter by way of the said indenture wherein it agreed to provide a right of way to the owner of Lot 418 or its successors and assigns to 'construct at their expense a road' over Lot 417 as access to the public road. It is agreed that such road and its position would be determined, "as the purchasers deem suitable". The purchaser in this content means the appellant.

[5] The second respondent had subsequently applied to the Majlis Perbandaran Pulau Pinang to develop its land into one block of 24 storey condominium complete with parking facilities.

[6] The second respondent then entered into negotiations with the appellant to construct a road over Lot 417 as access from its land to the public road, namely Jalan Tanjung Bungah. The second respondent proposed a road along the boundary of Lot 417 with Lot 691 (southern boundary) and Lot 4162 (eastern boundary) as shown in the plan marked yellow in Annexure B. The appellant had no objection to the second respondent's proposal for a right of way over its land but it proposed a shorter route along its northern border running parallel to Jalan Tanjung Bungah as shown in the plan marked green in Annexure A.

[7] The appellant pointed out that under the indenture it has the right to determine the position of the right of way. The area required for the right of way as proposed by the appellant would also be less compared to the second respondent's proposal which would consume about 1/3 of the appellant's land.

[8] The second respondent disagreed and decided to apply to the Land Administrator for a private right of way over Lot 417 based on a plan similar to what it had earlier proposed to the appellant.

[9] On 8 February 2006 the Land Administrator, after making due enquiry and investigation under s. 390(3) of the National Land Code ('NLC') and upon being satisfied that it was expedient to create a private right of way, granted the second respondent's application for a private right of way based on its proposal. This private right of way granted by the Land Administrator was 40 feet in width, to be constructed along the boundary of Lot 417 with Lot 691 and Lot 4162 covering an area of about 21,732 square feet, which is about 1/3 of the appellant's land. (See plan marked red in Annexure B). The approved right of way must conform to the specifications set by the Public Works Department.

[10] Being aggrieved by the decision of the Land Administrator, the appellant appealed to the High Court against the said decision. It was submitted before the High Court that the Land Administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the right of way. The private right of way granted by the Land Administrator had greatly prejudiced the appellant as it consumed about 1/3 of its land. Lot 418 is not 'landlocked' as it already had an existing right of way over Lot 417 by virtue of the said indenture. The private right of way granted by the Land Administrator was, in reality, tantamount to granting a public right of way over Lot 417 for the convenience of the second respondent who proposed to build a 24 storey condominium complete with parking facilities on Lot 418. It was further submitted that the right of way granted by the Land Administrator was in contravention of s. 393(1) of the NLC as no compensation was given to the appellant for the creation of the private right of way.

[11] The High Court, in dismissing the appeal by the appellant held, among others, that Lot 418 was landlocked with no direct access to the public road and that the Land Administrator had

not erred in exercising his discretion in granting a private right of way over Lot 417. The learned judge did not agree with the appellant's contention that the private right of way granted by the Land Administrator was in fact a public right of way because in his view s. 389(3) of the NLC provides that a private right of way created for the benefit of the proprietor authorises the proprietor and persons acting with the express or implied consent of the proprietor to pass and repass between the land and public terminal.

[12] The learned judge however disregarded the appellant's contention that the order of the Land Administrator contravened s. 393(1) of the NLC as no compensation was given to the appellant.

[13] The appeal before us was based substantially on similar grounds as submitted by learned counsel for the appellant before the High Court. After hearing the parties and scrutinising the record of appeal, we allowed the appeal with costs and set aside the order of the High Court in affirming the decision of the Land Administrator.

[14] It is not in dispute that the second respondent's application under s. 390(1) of the NLC was for a Land Administrator's private right of way over Lot 417. Section 389(1) of the NLC states that a Land Administrator's right of way may be either:

(a) a private right of way; or

(b) a public right of way.

A private of way created for the benefit of the State Authority or the proprietor or occupier of any alienated land is referred to as a private right of way (s. 389(1)(a)). A private right of way created for the benefit of the public is referred to as a public right of way (s. 389(1)(b)).

[15] Section 390(3) of the NLC confers upon the Land Administrator a discretionary power to create a right of way upon receipt of an application and after making due enquiry or investigation under s. 390(2) NLC, as he thinks appropriate.

[16] It is clear from the order of the Land Administrator that the right of way over Lot 417 granted to the second respondent was Land Administrator's private right of way for the benefit of the second respondent and not for the benefit of the public. The right

of way for the benefit of the public is known as a public right of way (s. 389(1)(b)). The said right of way was not created for the benefit of the State Authority. A private right of way for the benefit of the proprietor authorises the proprietor and persons acting with the express or implied consent of the proprietor to pass and repass between the land and a public terminal. Thus, a private right of way created under s. 390 of the NLC in favour of the second respondent is not intended for the use or benefit of any person other than for the benefit of the proprietor of Lot 418 and those acting with express or implied consent of the said proprietor. Put differently, a private right of way for the benefit of the proprietor is not meant for unrestricted or unimpeded access to any member of the public. That distinguishes the word 'private' from the word 'public'.

[17] The engineering report tendered by the second respondent shows that only 60% of Lot 418 is usable for building development. The total area of Lot 418 is 62,057 square feet. The adverse effect of the right of way on Lot 417 was obvious. The second respondent benefited at the expense of the owner of Lot 417 as it would be able to maximise that 60% of its usable land for commercial or residential development by constructing a 40 feet width of right of way covering an area of 21,732 square feet which is equivalent to 1/3 of the appellant's land. The engineering report states that the 'best route to access Lot 418 is from the entrance at northwest corner of Lot 417 as evidenced by the photographs in Annexure 2. This will be the least disruptive to the usage of Lot 417. It is costly to construct a road from Lot 418 directly to the public road. The report states that: "It will be very costly to remove the granite/soil-nail slope and reconstruct it again. In addition the cost of earthwork will be high and the difficulty of utilising and maximise land usage of Lot 418". Hence, it recommends that the road access be constructed at the south west corner through Lot 417 as this is the only feasible and realistic access.

[18] Ooi Boon Seng, the director of the second respondent had admitted in his affidavit affirmed on 18 April 2008 that the second respondent had purchased Lot 418 for purposes of development after it had verified that Lot 418 had obtained a right of way over Lot 417 by virtue of the said indenture. He confirmed that the second respondent had applied to Majlis Perbandaran Pulau Pinang to build a 24 storey condominium with parking facilities on Lot 418.

[19] We are of the view that the second respondent's primary intention in applying for Land Administrator's private right of way over Lot 417 was for commercial development of its land and not solely for its own benefit or for the benefit of persons acting with its express or implied consent.

[20] The Land Administrator, in his affidavit in reply stated that it was the right of the Land Administrator to create a private of right of way and that the topography of Lot 418 bordering Jalan Tanjung Bungah with a steep slope of between 6 and 13 meters high would make it impossible to construct an access road from Lot 418 directly to the public road. The right of way was approved after taking into consideration the requirements of technical departments and the terms of the indenture which provides that the said road shall be constructed in such manner as are approved by the Rural Board. The right of way over Lot 417 would also benefit its owner in the event that it proposed to develop its land. The Land Administrator denied that the right of way would prejudice Lot 417 as it did not involve the acquisition of Lot 417 and that Lot 417 together with the right of way still belongs to the appellant. What then is the effect of the right of way over Lot 417? Section 388(2) NLC makes it clear that the rights conferred and obligations imposed in respect of any land by the creation of a Land Administrator's right of way shall run with the land and shall be binding on the land's proprietors and occupiers for the time being.

[21] We agreed with learned counsel for the appellant that the Land Administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the private right of way of 40 feet in width which occupied about 1/3 of Lot 417. This had greatly prejudiced the appellant. The primary intention of the second respondent was to maximise the use of its usable land for commercial development. A private right of way under s. 390(3) NLC in favour of Lot 418 is meant for the benefit of the proprietor of Lot 418 or persons acting with its express or implied consent only. It is not for the benefit of any member of the public. It is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. Where it is wrongly exercised, it becomes the duty of the courts to intervene. (See *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 at p. 148, *Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors* [1986] 1 CLJ 584; [1986] CLJ (Rep) 673; [1987] 1 MLJ 147).

[22] The purpose of private right of way is to allow the proprietor of landlocked land or persons acting with its express or implied consent to pass and repass between the land and a public terminal. A public terminal as defined in s. 387 of the NLC means the foreshore, or a river, railway station or public road.

[23] *Blacks Law Dictionary*, 9th edn. explains the meaning of the word 'landlocked' as:

> ... surrounded by land, with no way to get in or out except by crossing the land of another.

In *Law Lexicon*, Reprint 1999, the word 'landlocked' is interpreted as "fully or almost enclosed by land". In our view the learned judge erred in holding that Lot 418 was landlocked with no access to the public road. The director of the second respondent had in his affidavit acknowledged that Lot 418 had been given a right of way over Lot 417 by virtue of the said indenture. The engineering report states that there is an existing access path to Lot 418 from Jalan Tanjung Bungah via Lot 417 except that the existing path is not a tarred road and impassable to most motor vehicles. The appellant recognised the second respondent's right of access over Lot 417 by reason of the said indenture. It had proposed to the second respondent to construct the access road at the place marked in green in Annexure A, which would occupy a lesser area. But the second respondent wanted to dictate where the access should be.

[24] The engineering report states clearly that the best route to access Lot 418 is from the entrance at northwest corner of Lot 417. This fact, was before the learned judge as well as the Land Administrator but it was not duly considered. We agreed with learned counsel's contention that cost was in fact a determining factor as to where the right of way should be located.

[25] It is now settled that where there is an alternative right of way the Land Administrator must take that fact into consideration (*Liow Tow Thong & Ors v. Pentadbir Tanah Alor Gajah & Ors* [1996] 1 LNS 131; [1998] 1 MLJ 79; *Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors* [1986] 1 CLJ 584; [1986] CLJ (Rep) 673; [1987] 1 MLJ 147).

[26] In *Si Rusa Inn & Ors*, *supra*, the High Court set aside the collector's private right of way granted to the second respondent over the first appellant's land as it found that there was an

alternative route to the seashore via the public road although the distance was between 1km and 2km from the second respondent's land. Peh Swee Chin J (as he then was) said that there must be something more than just mere inconvenience or convenience; some situation that partakes of gravity or urgent necessity. On the facts in the instant appeal, it was more convenient and less expensive to construct an access road based on the plan as proposed by the second respondent.

[27] The next ground of appeal is on the issue of compensation. The Land Administrator was clearly in breach of s. 393(2) of the NLC in failing to make an order of compensation when granting the private right of way, to which the appellant was entitled to under s. 393(1) of the NLC. This issue was raised before the learned judge but it had not been duly considered. The words used in s. 393(1) NLC is "for the use" of his land and not "for damage suffered" as in s. 393(3) NLC. Thus, s. 393(1) does not disentitle the appellant for compensation for the "use" of his land.

[28] In the result, we allowed the appellant's appeal with costs and set aside the order of the High Court in affirming the decision of the Land Administrator. In consequence thereof the memorial in Form 28B dated 8 February 2006 entered in the register document of title and issue document of title of Lot 417 should be cancelled.